8385

SUPREME COURT OF THE UNITED STATES.

JOHN H. EVANS, as Receiver, etc., Plaintiff in Error, vs. ANDREW J. NELLIS.	No. 278. Brief by Defendant *pro se*, Johnstown, N. Y.

Writ of Error to the Circuit Court of the United States, for the Northern District of New York, from the United States Circuit Court of Appeals, Second Circuit.

Pending the appeal, the latter Court certifies certain facts to this Court, and thereupon desires instructions upon the following questions of law:

First: Are sections 14 and 15 of the Laws of Kansas of 1899 valid legislation in view of the provision of the Constitution of the State of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than "dues from corporations"?

Second: Do sections 14 and 15 aforesaid contravene the Constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the State of Kansas?

Third: Is the plaintiff, as a receiver appointed as aforesaid, entitled to maintain an action in the Circuit Court of the United States for the Northern District of New York?

POINTS.

I.

The legislation in question is valid; provided, that:

1. It was not intended to operate retrospectively;

2. It does not authorize an action at law against a stockholder in a jurisdiction foreign to the corporation's domicile to recover an amount equal to his stock at par value, irrespective of the corporate dues, or of the aggregate corporate stock;

3. The laws of Kansas require notice of the application to select and appoint the receiver to be given to those (creditors and stockholders) interested in such selection and appointment.

"A construction should be given, if possible, to this statute that will render it free from constitutional objection; and the

presumption must be that the legislature intended to grant such rights as are legitimately within its power. It ought never to be assumed that the law-making department of the government intended to usurp or assume power prohibited to it. And such construction, if the words will admit of it, ought to be put on its legislation as will make it consistent with the supreme law."

Grenada Co. Supervisors v. Brown, 112 U. S., 261, 270.

"It is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law."

Presser v. Illinois, 116 U. S., 252, 268.

(*a.*) *The statute repealing the former law upon the subject and enacting this new law on the 11th January, 1899, (Certf. p. 3, fol. 4), more than one year after the judgment described in the certified facts was rendered and execution thereon was returned unsatisfied (Id. p. 1, fol. 2), was not intended to operate retrospectively.*

Mr. Crissey recovered his judgment against the corporation and had execution returned unsatisfied thereon on the 31st day of December, 1897, or soon thereafter (Id. p. 1, fol. 1). He then had a vested right of action against this defendant to recover the amount of that judgment; and if this defendant had a counterclaim or an affirmative defense which he could urge against Mr. Crissey, he had a vested right then, on the 31st day of December, 1897, to urge that counterclaim or affirmative defense in any action which Mr. Crissey might have brought against him.

Whitman v. Nat'l Bank of Oxford, 176 U. S., 559.
Steffins v. Gurney, 61 Kan., 292, 294.
Brigham v. Nathan, 62 Kan., 243, 248.

"'Any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.' McCracken v. Hayward, 2 How., 612; Cooley, Const. Lim., 285. Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving, only, those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice. Cooley, Const. Lim., 362–369."

Pritchard v. Norton, 106 U. S., 124.

"Words in a statute ought not to have a retrospective opera-

tion, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will effect or interfere with their antecedent rights, services and remuneration; which is so obviously improper that nothing ought to uphold and vindicate the interpretation but the unequivocal and inflexible import of the terms and the manifest intention of the legislature."

United States v. Heth, 3 Cranch, 399, 413.
Cook v. United States, 138 U. S., 157.
United States v. Burr, 159 U. S., 78.

" 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective.' "

Sturges v. Carter, 114 U. S., 511; quoted from Mr. Justice Story in Society v. Wheeler, 2 Gall., 139.

"It is always to be presumed that the law was intended, as is its legitimate office, to furnish a rule of future action to be applied to cases arising subsequent to its enactment. A law is never to have retroactive effect unless its expressed letter or clearly manifested intention requires that it shall have such effect. If all its language can be satisfied by giving it prospective operation, it should have such operation only."

N. Y. etc. R. R. Co. v Van Horn, 57 N. Y., 473, 477.
Germania Savings Bank v. Suspension Bridge, 159 N. Y., 362, 369.
Dash v. Van Kleeck, 7 Johns., 499.
Geneva etc. Ry. Co. v. N. Y. C. etc. R. R. Co., 163 N. Y., 228, 232.

"The legislature has control of remedies by which final judgments may be obtained, but cannot confiscate, recall or put again in jeopardy the rights and property established by judgments already obtained."

Matter of Greene, 166 N. Y., 485, 492.

There is not one word in the statutes or in the entire body of the law of which the statutes in question form a part to indicate that the legislature intended that the statute was to have retroactive effect. On the contrary, every word of that statute and of every statute which should be read with it shows that the intent of the legislature was that it should be a rule for future cases to govern rights not yet vested. The phrase in the statute, If any execution shall have been issued—does not refer to the time of the statute's enactment but to the future time when

upon proper application to the court "a receiver *shall be* appointed."

See Statutes cited at page 3 of Certificate.

Before this statute, it had not only been decided by this court that the individual creditor having execution unsatisfied upon a judgment of a competent court, recovered against the corporation, could pursue the individual stockholder in any jurisdiction of the United States, but it had also been decided that the stockholder liability could not be enforced by the receiver in his own name, or in the name of the corporation. It was not an asset of the corporation.

Mech. Savings Bank v. Fidelity etc. Co., 87 Fed., 113.
Hancock Nat'l Bank v. Ellis, 172 Mass., 39, 45.
Evans v. Nellis, 101 Fed., 920.

A statute of Kansas, then and still existing, provided that in the construction of the statutes of the state, "the following rules shall be observed, unless such a construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute: *First*, The repeal of a statute does not revive a statute previously repealed, nor does such repeal effect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

Gen'l Statutes of Kansas, 1899, Sec. 66.

Under this statute it has been held by a Federal Court that the Laws of 1899, Chap. 10, in question here, do not affect the right of the creditor to sue.

Kisseberth v. Prescott, 95 Fed., 357, citing
State v. Boyle, 10 Kan., 113.
State v. Crawford, 11 Kan., 32.

Plaintiff in error has the burden of satisfying the court that the statute has a retroactive effect.

O'Reilly v. Utah, etc. Co., 87 Hun, (N. Y.) 406, 412.

In his brief, he admits that Mr. Crissey, the judgment creditor, has the right to recover the amount of his judgment against this defendant under the old statute, provided this defendant has not paid the amount of his liability to the receiver, and also provided Mr. Crissey had proceeded before the receiver did.

(*b.*) *The statute in question does not authorize an action at law against a stockholder in a jurisdiction foreign to the corporation's domicile to recover an amount equal to his stock at par value, irrespective of the corporate dues or of the aggregate corporate stock.*

It is settled law that the constitutional provision, in so far as it is self-executing, operates in favor of creditors as a class

Since respondent's brief was printed and filed in this Court, the Kansas Supreme Court has decided that, under the law in question (Chap. 10 of 1898), the proceeding to collect from stockholders of a corporation a judgment previously obtained against the corporation is an equitable proceeding, and all stockholders within the jurisdiction must be made parties, to the end that all debts of the corporation may be adjudged, and assessments made sufficient to satisfy such debts.

Waller vs. Hamer, 69 Pac. 185.

and collectively, and against stockholders as a class and collectively. It secures the dues from corporations through the individual liability of stockholders in the interest of all the creditors alike.

Nat'l Bank of Oxford v. Whitman, 176 U. S., 559.
Woodworth v. Bowles, 61 Kan., 568.

In Woodworth v. Bowles (supra) the Supreme Court of Kansas, per Doster, C. J., said, referring to the old provisions of the law quoted in the certificate and repealed by the new law: "However, back of these statutory provisions which thus mark out the remedies to be adopted by the creditors of corporations for the recovery of their demands against its stockholders, lies the constitutional provision before quoted, which, independently of all legislation upon the subject, must be allowed self-operative force as the terms employed indicate the framers of the organic law intended it should be. If the legislative enactments are not up to the requirements of the constitution, and if the constitution be self operative to the ends sought to be reached, this court must carry out the mandate of the organic instrument. It is evident that, if the constitutional provision be self-executing, it operates in favor of creditors as a class and collectively, and against stockholders as a class and collectively. If the constitution itself secures dues from corporations through the individual liability of stockholders, it secures them in the interest of all the creditors alike. In such event the provisions, being declarative of a rule of general right and of general liability, would of necessity assert itself through the legal forms adapted to its ends. Those ends, being equality of right and equality of liability, could be reached only through the equity procedure of the courts. Although the legislature might rightfully devise a mode of procedure adapted to the end in view, yet, in the lack of such legislative enactment the constitution, through its self operative force, would seize upon and appropriate to its purposes such general forms of action as had been already provided for similar cases, and in such event the petition of the plaintiffs in court below might be maintained." (The action was in equity by a creditor of the corporation in behalf of himself and other creditors against the stockholders to recover the additional stockholder liability, or so much thereof as might be necessary to pay corporate dues).

Mindful of the constitutional provision and desiring to enact a procedure which would give it effect and provide for equality of right among the creditors and equality of liability among the stockholders, the sections in question were enacted in which, on the return of an execution unsatisfied, the corporation was "put out of commission" It could do no new business, create no new liabilities, and a receiver was provided for, who, in behalf of all the creditors as a class, should bring action against all stockholders as a class to recover, not the entire stockholder liability, but so much thereof as might be necessary to pay the

corporate dues ; that action, of necessity, must be in equity and within the jurisdiction of the corporation's domicile ; for it has been held over and over again that a bill in equity cannot be maintained in a foreign jurisdiction to enforce the statutory liability of a stockholder in a corporation organized under the laws of Kansas.

Terry v. Little, 101 U. S., 216.
Horner v. Henning, 93 U. S., 228.
Terry v. Tubman, 92 U. S., 156-161.
Pollard v. Bailey, 20 Wall., 520.
Fourth Nat'l Bank v. Francklyn, 120 U. S., 747.
State Nat'l Bank v. Sayward, 86 Fed., 45.
First Nat'l Bank v. Dillingham, 147 N. Y., 603.
Marshall v. Sherman, 148 N. Y., 9.
Bank of North America v. Rindge, 154 Mass., 203.

It will not do to say that such a construction is not competent because the stockholders of a corporation may not be within the jurisdiction of the courts of Kansas, for it is settled law "that where the corporation is created by the laws of a state, the legal presumption is, that its members are citizens of the state in which alone the corporate body has legal existence."

National Steamship Co, v. Tugman, 106 U. S, 118; quoting Ch. J Taney in R. R. Co. v. Wheeler, 66 U. S., (1 Black) 296.
R. R. Co. v. Letson, 2 How., 497.

Perhaps, too, after the exact corporate dues had been determined in a proper action in a court of the corporation's domicile, a receiver or other officer duly appointed by that court might be permitted to maintain an ancillary action at law in a foreign jurisdiction against a non resident stockholder for the benefit of all creditors to recover his fair share of the dues so established. (Hale v. Hardon, 95 Fed., 747, 754). Otherwise, an action at law against a stockholder to recover upon his added liability cannot be maintained.

The new statute simply reiterates the constitutional provision so far as added liability is concerned ; and provides that such liability "be considered an asset of the corporation in the event of insolvency and to be collected by a receiver for the benefit of all creditors." (Certf p. 3, fol. 5, Sec. 46). The intent of the legislature is manifest ; to provide for equality of right among the creditors and equality of liability among the stockholders. Therefore, under the well settled and leading case of Pollard v. Bailey (*supra*), this defendant can only be called upon to pay so much of $60,200 as may be necessary to satisfy his proportionate share of the corporate dues. His share of the burden must first be determined in an appropriate action in equity. If the defendant could not be made a party to such action, he doubtless would be so represented therein by a receiver of the corporation (competently selected and appointed)

as to be bound by the ascertainments therein of the corporate dues, and his proportionate share thereof, or so as to make such ascertainment, at least *prima facie*, competent against him. Then the action at law in a competent court of his domicile could only proceed against him for such proportionate share; and all the facts as to appointment of receiver, the proper suit in equity, and the ascertainments made therein, would have to be alleged and proved before he could be held liable. The certified facts do not disclose any such procedure. On the contrary, they impliedly negative its existence. "The proportion of the indebtedness with which the stockholder is to be charged can be ascertained only upon taking an account of the debts and stock of the corporation; and a court of equity is the proper tribunal to bring before it all necessary parties for that purpose."

Mills v. Scott, 99 U. S., (9 Otto) 25, 29.

It is respectfully insisted that under the new statute (using the language of Mr. Ch. J. Waite in Pollard v. Bailey, *supra*) each stockholder is bound for the debts in proportion to his stock; his liability is limited to an amount equal to the par value of his stock; and he is not bound absolutely for the payment of the full amount of that. He must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more. For the purposes of this case it is not necessary to decide what effect the insolvency of any of the stockholders might have upon such as are solvent. It is certain that no stockholder is liable for more than his proportion of the debts This proportion can only be ascertained upon an account of the debts and stock and the *pro rata* distribution of the indebtedness among the several stockholders. The proper action, therefore, to enforce the liability is one in which such an account can be stated and distribution made Such an action called especially for the exercise of the powers of the court of equity which could bring before it all the necessary parties and adjust all their rights. Every stockholder, when called upon to perform his obligations, has the right to require that the extent thereof shall then be determined once for all, as well that which he is under to his associate stockholders as that to the creditors. Otherwise, he might be made to respond to the creditors under that rule and obtain his relief from the other stockholders under another. The provision, therefore, for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it.

The ascertainments of the debts and assets of the corporations are necessary preliminaries to a recovery in an extra-territorial proceeding against non-resident stockholders to enforce extra-territorially the individual stockholder liability created by statute; and to entitle the creditors, or the parties representing them, to judgment, it is incumbent upon plaintiff that the as-

certainments intended by the statute have been made ; and he should show by record or otherwise that they have been made in a comprehensive proceeding in the parent forum with the necessary parties to that end.

Hale v. Hardon, 95 Fed., 747, 754, 755.

While section 32 of the statute (Certf. p. 3, fol. 5) directs the receiver to immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders, equal to the par value of the stock held by each, it does not direct him to proceed at law against any stockholder to collect the whole of his added liability ; nor do the provisions following in the section indicate that the legislature intended the receiver should proceed at law to recover the whole of the stockholder's added liability, irrespective of the amount of the corporate dues. The statute should be construed liberally, to the end that that should be done which ought to be done ; it should be held to intend an available remedy, but one which conformed to the requirements of the general rules of equity jurisprudence.

The principle of comity is always administered in accordance with equity. In the construction of the Kansas constitutional provision and statutes in question, the case of Woodworth v. Bowles, *supra*, is controlling authority, except in so far as a question of the Federal Constitution is involved. In the case cited the state constitutional provision is clearly construed and elucidated. The new statutory provision is the same as the constitutional one. It differs only in making the stockholder added liability an asset of the corporation in the event of its insolvency. Following the Kansas Supreme Court in the construction of these provisions, and applying equitable considerations, it cannot be held, for example, that where an execution is returned unsatisfied upon a claim of $100, the only debt of the corporation having a thousand stockholders, each holding stock of the par value of $100,000, that the receiver could pursue any single stockholder in a foreign jurisdiction, at law, and recover and carry to the state of Kansas $100,000.

Counsel for plaintiff in error, urging the validity of the legislation, contend that thereby an action at law in a foreign corporation is not contemplated to recover the entire amount of the stockholder's added liability, irrespective of the corporate dues; but they insist, illogically as it seems to the defendant, that in this action at law to recover defendant's entire added liability, it is matter of equitable defense that only a portion thereof is required to pay all the corporate dues, and that it is wholly immaterial under the statute whether or not there are other stockholders who are also liable. They seem to think and to argue that in an action at law against one stockholder in one jurisdiction, the corporate dues may be determined to be a certain sum and in another action at law in another jurisdiction

against another stockholder, they may be determined to be a different sum; and yet the statute contemplates that in the windup, the rights of contribution between the stockholders shall be somehow established and protected. Are, then, the corporate dues to be ascertained afresh and perhaps established at an entirely different amount at the suit of one stockholder against others for contribution?

(c.) *But the validity of the legislation in question may be successfully attacked, because the statute laws of Kansas do not provide that the creditors of the corporation and the stockholders thereof should have notice of the application for the selection and appointment of the receiver. The procedure enacted, therefore, is not due process of law.*

The cost and expenses of winding up the affairs of the corporation may be legitimately regarded as "corporate dues". The receiver is given large discretion to represent the corporation, its stockholders and the creditors of the corporation. While the corporation is deemed insolvent, *it may be* solvent and stockholders are equally interested with creditors in winding up its affairs. Manifestly, the receiver's appointment could not be had in the action which proceeded to judgment upon which the execution was returned unsatisfied. It must be that he is to be appointed in an independent proceeding instituted in the same court in which the judgment was recovered; that proceeding could only be instituted upon notice to those entitled to be heard; and the statute authorizing the procedure or other statutes *in pari materia* must not only authorize, but require, notice to be given, not alone to the corporation, but to the creditors whose rights, and to the stockholders whose rights and liabilities, are thereby likely to be materially affected. The stockholders, as to the added liability, after execution returned unsatisfied, are no longer bound by a proceeding in which the corporation is represented, because the corporation is dissolved by law; and the added liability of the stockholders is only an equitable asset of the corporation solely for the benefit of its creditors. The collection of this asset is not an incident of the usual proceedings to liquidate the corporation's affairs The new legislation makes that which was the individual right of the creditor an equitable asset of the corporation itself, to be collected by this receiver for the benefit of all the creditors. The constitutional provision securing corporate dues being self-executing, and the old statutes controlling the matter being repealed any creditor using the equitable procedure customary in courts of general jurisdiction within the State of Kansas upon the insolvency of the corporation might have brought an action for himself and other creditors to enforce the stockholder liability. The legislature directing that a man, perhaps not a creditor, should be selected by the court to enforce this constitutional right, ought to have provided for a hearing in which the creditors and stockholders might have had a voice in the

selection and appointment of the receiver. The statute itself provides for no notice, and no general statute of Kansas provides for notice of such an application to all persons interested.

Due process, therefore, in the selection and appointment of such a receiver implies notice and a hearing at least to the creditors to be affected.

Orchard v. Alexander, 157 U. S., 372, 383.

No judgment of a court is due process of law if rendered without notice to the party.

Scott v. McNeal, 154 U. S., 34, 46.

And any statute which provides a means of enforcing a constitutional right and delegates such enforcement to a person other than the possessor of the right and vests the person so delegated with large discretionary powers in the enforcement of that right without giving the owner of the right an opportunity to be heard in the selection of the person so delegated, is invalid legislation. It *is* more than a provisional remedy like the appointment of a receiver in an action; and, therefore, the *statutory* receiver ought not to be selected without notice.

Elwood v. Nat'l Bank, 41 Kan., 475, 478.

II.

If this action be within the scope, meaning and intent of sections 14 and 15 of Kansas Laws of 1899, then those sections are not valid legislation.

The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be rightfully done under it.

Montana Co. v. St. Louis Mining and Milling Co., 152 U. S., 160, 170.

Plaintiff's counsel contend that the validity of legislation is always a question of fact, and that the one attacking its validity has the burden of proving the facts upon which the statute may be determined to be invalid as against him; that the statute is voidable, only; and that no one can be heard to attack it unless the court first determine that facts exist by reason of which, if the legislation were held to be valid, he would be necessarily and certainly injured. Under this contention, whether or not legislation were valid and in harmony with constitutional provisions would be a question of fact to be determined by the jury. It is sufficient, as defendant contends, if facts are shown to exist which place the defendant asserting the invalidity of the legislation in a class which *might be* affected by such legislation, and that the only limitation upon the right of any citizen

to urge the unconstitutionality of a statute is that he must belong to a class which *might be* injured thereby.

Red River Valley Nat'l Bank v. Craig, 181 U. S., 548, 558.

The facts for consideration by this court are: That E. B. Crissey is a judgment creditor to the extent of $6,848.65, and had execution unsatisfied on the 31st December, 1897, (Certf. fol. 2); that defendant then owned $60,200 of the capital stock of the debtor corporation then existing (fol. 3); that plaintiff in error was appointed receiver on the 9th June, 1898, on motion of judgment creditor more than six months previous to the enactment of the legislation in question, (fol. 2).

So far as the record in this court discloses, there are no other debts.

Plaintiff's counsel contend that Mr. Crissey's rights are in nowise impaired by the new law, and if they were defendant could not complain. The obligation of the defendant's contract with Mr. Crissey at the time that he recovered his judgment against the corporation was that he would pay the amount of that judgment to Mr. Crissey direct, and not to the corporation or its receiver, however appointed, and that Mr. Crissey might recover the amount at law against defendant, unless defendant had a counterclaim against Mr. Crissey which might be urged to extinguish or to reduce Mr. Crissey's cause of action; defendant might also urge affirmatively the statute of limitations and perhaps other affirmative defenses.

It is contended in their brief by plaintiff's counsel, that in this action in order to attack the validity of the legislation in question the defendant must show, and the court must determine, that the defendant *in fact had* a defence, legal or equitable, to Mr. Crissey's action; that is to say, if the defense exist, defendant must establish it here and also establish it in Mr. Crissey's action to make it available to him. If the contention be correct, nevertheless, defendant's rights are impaired. Before the statute, he could have the benefit of the defense if he satisfied the court in which Mr. Crissey sued; now, he must satisfy the court in which the receiver has brought him that he has such a defense, and then, in case Mr. Crissey brings action against him, he must again satisfy the court Mr. Crissey selects that he has the defense. Are not, then, the means of enforcing that defense impaired by the new statute? Even adopting the reasoning of counsel for the plaintiff:—Before the new statute defendant had a vested right to interpose the defense in Mr. Crissey's action and that would have ended it if the defense were successful. Under the new statute and according to plaintiff's contention, defendant must have the existence of the defense established in this action, and if thereby he defeats the plaintiff, Mr. Crissey is at liberty to sue and he must establish it again in the court selected by Mr. Crissey. The contention is absurd.

The real questions are: May the antecedent rights of stockholders in this corporation, as a class, be impaired by this new legislation? If yea, is the defendant such a stockholder?

If *now* the stockholder is liable to be sued by Mr. Crissey and also by the receiver, how is the pendency of the one action any defense in the other even if both actions were brought in the same forum? Mr. Crissey would sue to recover the amount of his judgment for himself; the receiver, if he recover, would or might apply his recovery to an entirely different purpose. Although the Crissey judgment were the only debt of the corporation, nevertheless in Crissey's suit thereupon defendant could not successfully maintain that because receiver had sued first, Crissey could not recover.

"The obligation of a contract, in a constitutional sense, is the means provided by law by which it can be enforced; by which the parties can be obliged to perform it. Whatever legislation lessens the efficiency of this means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is, to that extent, weakened."

Louisiana v. New Orleans, 102 U. S., (12 Otto) 203.

A State Act repealing the stockholder individual liability imposed by statute is, as to debts contracted before the repeal, a law impairing the obligation of the contract within the Constitution of the United States and void.

Hathorn v. Calef, 69 U. S., (2 Wall.) 10.

When the law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights.

Fletcher v. Peck, 10 U. S., (6 Cranch) 87.

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations', as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing'" * * * "It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement." * * * "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in

any respect on its obligation—dispensing with any part of its force."

Edwards v. Kearzey, 96 U. S., (6 Otto) 595.

In Bronson v. Kinzie, 1 How., 311, Ch. J. Taney, speaking of the protection of the remedy, said: "It is this protection which the clause of the Constitution now in question mainly intended to secure."

Vested rights acquired by a creditor under the State Statute are not affected by repeal of the statute.

Memphis v. U. S., 97 U. S., (7 Otto) 284.

Indeed, the plaintiff in error insists that the repeal of the old statute is ineffective as against Mr. Crissey, the judgment creditor, but that it is effective as against this defendant, who is liable to pay the amount of the judgment against the corporation directly to Mr. Crissey. How the repeal can be ineffective against the one and effective as to the other, counsel for plaintiff fail to explain. And how it can be seriously contended that defendant yet liable to respond directly to Mr. Crissey at his suit cannot be heard to urge the invalidity of legislation, which is ineffective to destroy Mr. Crissey's right to sue him, and yet gives that right to another also, this defendant is unable to understand.

While the new legislation does not undertake to annul the liability of the stockholders to the creditors for the debts of the corporation, it does more than modify the form of remedy and the rules of evidence, and it is not a Constitutional exercise of the power of the legislature as applied to debts contracted by the corporation before its enactment within the line of cases of which Fourth Nat'l Bank v. Francklyn, 120 U. S., 747, and Vial v. Penniman, 103 U. S., 714, are examples.

But the question whether or not defendant can urge the invalidity of the legislation is not before this court at this time. If the court below had not determined that defendant had the right to have the second question answered they would not have propounded it to this court.

If this action can be maintained, defendant may be compelled to pay other than "corporate dues."

The legislature may authorize means in addition to the self-executing provision of the Constitution *to secure* the ultimate payment of corporate dues. But it cannot apply the means authorized by the Constitution to the payment of anything else than corporate dues.

Assume:

That there are one thousand stockholders in the defunct corporation throughout the United States; that in one thousand different courts the receiver had sued, in each action a different stockholder being defendant; that judgment was recovered and

execution unsatisfied in nine hundred ninety-nine of these actions; that the entire cost to the receiver was $60,200; that in this action he recovered $60,200 and applied it, with permission of the court appointing him, to the payment of such cost. Have the "*dues*" of the corporation been decreased? Has not the security provided by the Constitution for the payment of those "dues" been frittered away? Has not the defendant in error been compelled to pay a liability which was not due from the corporation when it was dissolved, and, therefore, not due from himself?

Section 14 of the Kansas Laws of 1899 certainly contemplated that after execution returned unsatisfied against the corporation and receiver appointed, the corporation itself could not incur new liabilities, but is dissolved. (Certf., p. 3, fol. 4.)

These costs and expenses of the receiver in the assumed case were all incurred after dissolution and were liabilities, not of the corporation dissolved and then in liquidation, but the aggregate of the expense of pursuing different stockholders in different courts; the expense in each case, perhaps, being the separate liability of the stockholder pursued in that case, and not of any other stockholder, nor of the corporation.

"The individual liability of the stockholders, as imposed by and expressed in the statute, is, indeed, for all the contracts, debts, and engagements of such association, but that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business. That business ceased when the bank went into liquidation; after that, there was no authority on the part of the officers of the bank to transact any business in the name of the bank so as to bind its shareholders, except that which is employed in the duty of liquidation, unless such authority had been expressly conferred by the shareholders."

Richmond v. Irons, 121 U. S., 27, 64.
Schrader v. Bank, 133 U. S., 67.
And see Ward v. Joslin, 100 Fed., 676.

It cannot be that the costs suggested are incident to the duty of liquidating the corporation's affairs. True, section 15 of the statute assumes to make the stockholder liability an asset of the corporation in the event of insolvency. But it is an *equitable* asset even if the statute be valid and only for the benefit of the creditors; and the collecting of such equitable asset cannot be regarded as within the duty of liquidating the affairs of the corporation.

In the Richmond case (*supra*) this court considered that the expenses of the receiver in that case appointed were not a debt due from the corporation or from the stockholders.

If it be claimed that such costs are dues of the corporation, then each creditor and each stockholder is vitally interested in the selection of the receiver upon whom so much depends in the enforcement of his constitutional right or liability; yet, the re-

ceiver bringing this action does not appear to have been appointed at the instance of any creditor other than the judgment creditor; nor does it appear that any other creditor has had an opportunity to be heard upon the question of his selection. Is this due process of law?

If the statute contemplate notice to creditors, then the plaintiff in error is not the receiver intended by the statute; he was appointed six months before the statute took effect, and without notice to any creditor, upon the application of a single creditor.

Under the Constitutional provision $60,200 cannot be taken from defendant in error unless it be actually necessary to pay "dues" of the corporation. The statute in question, if this action be within it, unmindful of this constitutional restriction, authorizes,—*requires*,—the receiver to collect the whole $60,200, although the corporate dues may not amount to $1,000, including the receiver's expenses.

Evans v. Nellis, 101 Fed., 920.

III.

Sections 14 and 15 aforesaid contravene the Constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the State of Kansas.

The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement.

Murray v. Charleston, 96 U. S., 432, 449.

The defendant can and need add nothing to the able discussion upon this point contained in the decision of the learned Trial Court below, reported in 101 Fed., 920, which this defendant makes part of this argument.

Plaintiff's counsel contend that defendant contracted that the legislature of Kansas might alter, amend or repeal the charter or any law affecting the corporation. So he did; provided, however, that such alteration or amendment were valid within Constitutional limitations.

Under the statutes which formed a part of defendant's contract, he could not be held liable for any corporate dues which did not rest in judgment and have an unsatisfied execution against the corporation upon it.

Bank v. Whitman, supra.
Van Demark v. Barons, 52 Kan., 779.

The execution unsatisfied did not dissolve the corporation.

Merrill v. Meade, 6 Kan. App., 620.

The proceeding to enforce the liability was independent of the action in which the judgment was rendered—not a continuation of it, nor interlocutory or auxilliary to it.

Schnack v. Boyd, 59 Kan., 275.
Howell v. Manglesdorf, 33 Kan., 196.

IV.

Assuming the validity of the statute, nevertheless, plaintiff in error cannot maintain this action.

1. He is not the receiver appointed under the statute upon the dissolution of the corporation representing all the creditors; he represents merely the creditor at whose suit and upon whose judgment and execution returned unsatisfied he was appointed receiver. (Booth v. Clark, 58 U. S., [17 How.] 322). He was appointed six months before the statute; not because the corporation was dissolved or had become insolvent, but merely because an execution had been returned against it unsatisfied and the judgment was yet unpaid. He is a receiver only in proceedings supplementary to execution; he is merely the agent of the court; its arm, or its equitable execution, by means of which it intended to carry its judgment into effect and collect it.

The statute of Kansas authorizing his appointment is section 254 of the Civil Code, and now follows:

254. A receiver may be appointed *by the Supreme Court, the district court, or any judge of either*, or in the absence of said judge from the county, *by the probate judge.*

First. In an action * * *

Second. In an action * * *

Third. After judgment to carry judgment into effect;

Fourth. After judgment, to dispose of the property according to the judgment, or to preserve it during pendency of appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

Fifth. In the cases provided in this court and by special statute when the corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

Sixth. In all other cases where receivers have been heretofore appointed by the usages of the Courts of Equity.

(*Quere.* Does this statute authorize the appointment of plaintiff *by the Federal Court?* If not, then certainly the plaintiff is only a chancery receiver to aid the court in collecting Mr. Crissey's judgment, and for no other purpose.)

Booth v. Clark, 17 How., 322.
Hottenstein v. Conrad, 9 Kan., 436.

The appointment of such a receiver rests in the discretion of the court.

Fluker v. Emporia City Ry. Co., 48 Kan. 577.
Re Lewis, 52 Kan., 660.

A receiver is the hand of the court of which he is an officer. His appointment determines no right, does not affect the title of the property in any way, and his holding is the holding of the court.

Jackson v. King, (Kan. App.) 58 Pac., 1013.
Gableman v. Peoria, D. & E. R. Co., 179 U. S., 335.

The appointment of a receiver is in the nature of an equitable execution by which the court is able to reach only the actual interest of the debtor in the property impounded.

Longfellow v. Barnard, 79 N. W., 255; 58 Neb., 612; 81 N. W., 307.

A receiver appointed in sequestration proceedings can neither bring nor defend actions except by permission of the court appointing him; hence, such permission being the basis and a condition precedent to such right, a complaint of such receiver which fails to allege that such leave was obtained is demurrable.

Morgan v. Bucki, 30 Misc., N. Y., 245.

The right of a receiver appointed in another state to maintain an action is not absolute, but rests in the discretion of the court.

Wyman v. Eaton, 107 Ia., 214; 43 L. R. A., 695; 77 N. W., 865.

An order of appointment of a receiver which gives him authority to bring suits in other states is without efficacy to create such right without sanction in the states where the suits are brought. Id. (It is not claimed that the court in which this action is brought authorized it.)

A receiver of a corporation appointed in another state should not be allowed by an exercise of comity to sue for the enforcement of the liability of stockholders, when it would be in contravention of the rights of the citizens of the state and operate to their injury. Id.

As stated in Booth v. Clark 58 U. S., (17 How.) 322, the plaintiff is appointed under a creditor's bill, for one creditor, for his benefit, to the exclusion of all other creditors of the debtor, if there be any such, as there are in this case. Whether appointed under the statute of Kansas, or under the rules and practice of Chancery, his official relations to the Court are the same. "A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction

of the court into ability to act. He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, the privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." * * * "We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

Citing the case of Booth v. Clark, the Kansas Supreme Court recently said: "It is the established doctrine of the Supreme Court of the United States, sustained by the weight of authority in various states, that the receiver has no extra-territorial jurisdiction or power of official action, and cannot, as a matter of right, go into a foreign state or jurisdiction and there institute an action for the recovery of demands or debts due to the person or estate subject to his receivership."

Winans v. M'f'g Co., 48 Kan., 777, 780.

The certified facts do not show that the receiver was authorized, even by the Federal Court within the State of Kansas appointing him, to prosecute this particular action, but he was given a discretion to proceed against all or any stockholders, and, as the plaintiff in error may claim, in any jurisdiction. But this Court has held that a receiver cannot take charge of any proceeding in a foreign jurisdiction by commencing an action, or defending an existing action, without the *express* authority of the court whose officer he was, so as to bind any property or effects in his hands as receiver.

Pendleton v. Russell, 144 U. S., 640; Citing Booth v. Clark, (supra).

Leave to bring this particular action should have been obtained, both of the court appointing the receiver and of the court in which the action was brought. General leave to bring any action is improper.

Witherbee v. Witherbee, 17 App. Div., N. Y., 181.
Fogg v Supreme Lodge. 159 Mass., 9.
Castleman v. Templeman, 87 Md , 546.
Swing v. White River Lumber Co , 91 Wis., 517.
Rockwell v. Merwyn, 45 N. Y., 166.
Waters-Pierce Oil Co. v. American Exchange Bank, 71 Mo. App., 653.
Brigham v. Ludington, 12 Blatchf., 237.

Until the new statute passed and for six months after plaintiff was appointed receiver, he certainly could not have maintained this action. He did not possess in any sense the right of an assignee of Mr. Crissey's cause of action against this defendant. Defendant's liability was not, and could not have been, during that time, a corporate asset. Under the authorities above cited, he certainly, during that time, only represented Mr. Crissey, upon whose application he was appointed to aid the court in collecting his judgment, out of corporate property, and not to enforce an independent demand owned by Mr. Crissey.

Is it possible that this new statute could so interfere with rights thus vested as to clothe this receiver so appointed, so limited and controlled, this creature of the court's discretion, with all the powers of the statutory receiver of a dissolved corporation? Vest him with absolute title to all the property of the corporation so that the principle of comity would require his recognition in a foreign jurisdiction? Clothe him with ownership of a demand against this defendant which was not owned by the corporation but was the individual property of Mr. Crissey? Deprive this defendant of any counter-claim or affirmative defense which he might have as against Mr. Crissey? Further comment must be unnecessary.

The defendant respectfully insists that the first and third questions submitted to this august court must be answered in the negative and the second in the affirmative. It should also be decided that the legislation is invalid as subjecting stockholders to liabilities other than "dues from corporations".

ANDREW J. NELLIS,
Defendant.